

***United States Court of Appeals
for the Second Circuit***



APPENDIX

703
77-1382

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

FREDERICK J. MONTELBANO,

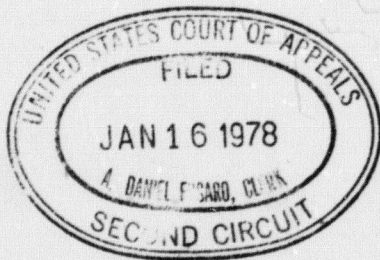
Defendant-Appellant.

Docket No. 77-1382

B
P/A

APPENDIX FOR APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FREDERICK J. MONTELBANO,
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,

Of Counsel.

PAGINATION AS IN ORIGINAL COPY

0208 1 0856

MONTELBANO, FREDERICK J.

03

77

0192

01

18:371
18:1951
18:659

OFFENSES CHARGED
Consp. to steal goods from interstate shipment 1
Obstruction of interstate commerce by threats 2
Theft from interstate shipment. 3

9/14

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began	High Risk Date 3-15-77	3-24-77	Trial Set For 8-1-77	Disposition of Charge 8-4-77
Summons Served	Indict. Waived	1st Plea 3-24-77	Trial Began 8-1-77	Disposition of Charge 9-7-77
First Appearance	In Charging District	Final Plea	Trial Ended 8-4-77	Disposition of Charge 9-7-77

John S. Siffert 255
791-1150

ATTORNEYS
Martin Erdmann
Federal Defender Services Unit
2 Lafayette St. 5th Ft.
NYC 10007 --577-3407

DATE	PROCEEDINGS
3-15-77	Filed Indictment.....Cooper, J.
3-24-77	Deft. (atty. Barry Fallick for arraignment only present) pleads not guilty. Bail \$5,000 PRB continued. Ordered F/P. Bail limits to include Eastern District of N. Y. Deft. continued under Pre-trial Services supervision. Case assigned to Griesa, J. for all purposes.....Wyatt, J.
3-24-77	Filed Financial Affidavit
3-24-77	Filed Order appointing counsel(Federal Defender Services Unit) Dated:3-24-77. BERNIKOW, U.S. Mag.
3-24-77	Filed Appearance Bond in the sum of \$5,000.00 Dated:3-24-77.
4-22-77	Filed affdvt. & notice of motion for a bill of particulars, discovery & inspection and to suppress etc.....

DATE	77Cr.192 TPG	IV. PROCEEDINGS CONTINUED	PAGE TWO
May 9-77	Filed Govts response to defts request for discovery...		
May 9-77	Filed affdvt. of J.S. Siffert, AUSA in opposition to motions to suppress...		
May 11-77	Filed defts memorandum of law.		
5-13-77	PTC HELD - GRIESA, J		
6-28-77	Filed deft's memorandum of law in support of disclosure of informant's identity.		
7-25-77	Filed deft's Memorandum of Law.		
*7-22-77	Trial date Aug. 1, 1977. GRIESA, J		
7-28-77	Filed deft's affidavit and notice of motion for an order that the court reconsider deft's motion for disclosure of the identity of a certain truckdriver witness.		
8-2-77	Filed memo endorsed on motion filed 4-22-77... Motion withdrawn except as to matters asserted in pre-trial conf.... Griesa, J... m/n		
8-3-77	Filed Govts proposed examination of prospective jurors		
8-3-77	Filed Govts memorandum of law in support of proffer of proof..		
8-3-77	Filed affdvt. R.W. Kosednar, Spec. Agent of F.B.I. dtd. 5-25-77...		
*8-1-77	JURY TRIAL BEGUN		
8-2-77	TRIAL CONTINUED		
8-3-77	TRIAL CONTINUED		
8-4-77	TRIAL CONTINUED & CONCLUDED JURY FINDS DEFT GUILTY on Counts 1, 2 and 3. SENTENCE ADJ to SEPT. 7, 1977 9:00 AM PSI Ordered. DEFT REMANDED. Bail Revoked. GRIESA, J		
8-4-77	Filed Deft's requests to charge..		
8-5-77	Filed Deft's proposed voir dire questions...		
8-8-77	Filed remand dated 8-4-77....		
8-25-77	Filed affdvt. & notice of motion for and order granting a new trial....		
9-7-77	Filed Judgment (Atty. David Gordon, Present) the deft is committed for imprisonment for a period of FIVE YEARS on each of Counts 1, 2, & 3, each count to run concurrently with each other..... The Court recommends that the deft. be placed at the Metropolitan Correctional Center, 150 Park Row, N.Y. pending the defts appeal..... Griesa, J..... Ent. 9-12-77-----		

3-5-13-77 E-1

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	CG NUMBER	DATE	RECEIPT NUMBER	CG NUMBER
------	----------------	-----------	------	----------------	-----------

- See PAGE 3 -

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

MONTELBANO, FREDERICK

77

0192

Yr.

Docket No.

0

D-

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA		
		(a)	(b)	(c)
9-12-77	(Document No.) Filed memo endorsed on motion filed 8-25-77...Motion denied.. So Orderd.....Griesa,J....m/n			
9-12-77	Filed order permitting deft's marriage at M.C.C.....Griesa,J. M/N.....			
9-14-77	Filed NOTICE OF APPEAL of deft to USCA 2nd Circuit from judgment filed on 9-7-77. Mailed copy to Martin Erdmann, Rm. 509 Foley Sq.NYC 10007-Atty for deft -copy to US Atty.			

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 CRIM. 0192

-----x
UNITED STATES OF AMERICA :

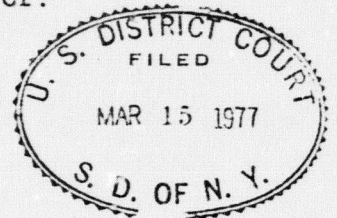
-v- :

FREDERICK J. MONTELBANO, :

Defendant. :

INDICTMENT

77 Cr.



-----x
COUNT ONE

The Grand Jury charges:

1. On or about December 7, 1976 in the Southern District of New York and elsewhere, FREDERICK J. MONTELBANO, the defendant, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree, together and with other persons unknown to the Grand Jury, to commit offenses against the United States, to wit, violations of Title 18, United States Code, Sections 659, ~~2315~~ and 2.

2. It was part of said conspiracy that:

(a) FREDERICK J. MONTELBANO would embezzle, steal, unlawfully take, carry away, and conceal from a wagon, motor truck, and other vehicle, with intent to convert to his own use goods and chattels, valued in excess of \$100, moving as and which were part of and which constituted an interstate shipment of freight, express and other property, to wit, approximately 11,000 pounds of lobster tails, shrimp and crab meat valued in excess of approximately \$32,000.00 wholesale.

~~(b) FREDERICK J. MONTELBANO would receive, conceal, store, barter, sell and dispose of goods, wares and merchandise of the value of \$5,000 or more, moving as and which were part of, and which constituted interstate commerce, knowing the same to have been stolen, unlawfully converted, and taken, to wit, approximately 11,000 pounds of lobster tails, shrimp and crab meat valued in excess of approximately \$32,000 wholesale.~~

TRG

MAR 15 1977

Overt Acts

3. In pursuance of the said conspiracy, and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

(a) On or about December 7, 1976 John Doe, a white male in his mid 20's or early 30's 5'8" to 5'10", 220 pounds or heavier, with dark curly hair, entered the driver's side of the cab of the O.K. Trucking Co. truck.

(b) On or about December 7, 1976 FREDERICK J. MONTELBANO drove a 1969 red Rambler, Vehicle Identification No. A 9A055A711621, bearing New York license plate number 510 CTF south on West Street following a truck belonging to the O.K. Trucking Co.

(c) On or about December 7, 1976, the driver of the O.K. Trucking Co. truck heard an unidentified male voice say to John Doe words to the effect: "Tell [the driver] to do what you [John Doe] tell him [the driver] or we'll blow [the driver's] brains out."

(d) On or about December 7, 1976, in the vicinity of the Fulton Fish Market, FREDERICK J. MONTELBANO entered the cab of the O.K. Trucking Co. truck on the driver's side.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

4. On or about December 7, 1976 in the Southern District of New York, FREDERICK J. MONTELBANO, the defendant, unlawfully, wilfully and knowingly did obstruct, delay and affect commerce and the movement of articles and commodities in commerce, to wit, approximately 11,000 pounds of lobster tails, shrimp and crab meat valued in excess of approximately \$32,000.00 wholesale by robbery did attempt and conspire so to do, and in furtherance thereof did commit and threaten physical violence to a person, to wit, the driver of an O.K. Trucking Co. truck.

(Title 18, United States Code, Section 1951, and Section 2.)

COUNT THREE

The Grand Jury further charges:

5. On or about December 7, 1976, in the Southern District of New York, FREDERICK J. MONTELBANO, the defendant, unlawfully, wilfully and knowingly did embezzle, steal, unlawfully take, carry away and conceal from a wagon, motortruck and other vehicle, to wit, an O.K. Trucking Co. truck, with intent to convert to his own use, goods and chattels valued in excess of \$100 moving as, and which were part of and which constituted an interstate shipment of freight, express and other property, to wit, approximately 11,000 pounds of lobster tails, shrimp and crab meat valued in excess of approximately \$32,000.00 wholesale.

(Title 18, United States Code, Section 659, and Section 2.)

Marion Jordan

Foreman

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

United States District Court

Southern District of New York

THE UNITED STATES OF AMERICA

vs.

FREDERICK J. MONTELBANO,
Defendant.

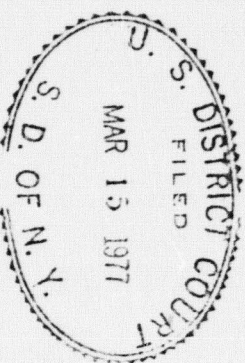
INDICTMENT

77 Cr.

ROBERT B. FISKE, JR.
United States Attorney.
A TRUE BILL

Mason J. Jenkins
Foreman.

FPI-SG-1-13-70-20M-4923



March 24, 1977 - Court (Att. - Doug. - Copen) Open
Faller - for Magistrate only. Plants not
guilty. BAC 500 PRB, continued,
Ordered F.P. Bail heats to include
Eastern Division of New York. Left.
Continued under pre-trial supervision.
Assigned David for all purposes.
Wright

May 13, 1977
PTC held

Mason, J.

July 22, 1977

Trial date Aug 1, 1977

Mason, J.

(over)

AUSA JOHN SIFFERT
DEPT ATT. DAVID GORDON

Aug 1, 1977

Jury Trial began

Aug 2 Trial continued.

Aug 3 Trial continued

Aug 4 Trial continued & concluded

Jury finds def't guilty on Counts 1, 2 and
Sentence Adj: to Sept ~~7~~ 1977 9:00 AM. PSI
ordered.

Bail Revoked

DEFT REMANDED

Griesa, J. J.

9/2/77-- Deft. present w/ atty. David Gordon of Legal
& AUSA John Siffert: Deft. sent. as follows:
Cts. 1, 2 & 3 - 5 yrs. ea. ct. Each ct. to run concurrent
w/ each other. Deft. to be placed at the MCC, 150;
Row NYC pending def't's appeal.

Griesa, J. J.

(24)

US
as
Mentelino

1 arm

396

2 CHARGE OF THE COURT

3 THE COURT: Ladies and gentlemen, you as a jury
4 are about to enter upon your final function in this case.
5 As I indicated to you at the beginning of the trial, you
6 are obligated to perform your functions in an attitude
7 of complete fairness, impartiality, with cool objectivity.
8 You cannot in any way allow your deliberations and your
9 decision to be influenced by hostility or sympathy or
10 any other emotions, whether for or against the Government
11 or for or against the defendant.

12 The case is of great importance to both sides.
13 It is important to the Government because the enforcement
14 of the criminal laws of this country is a matter of concern
15 to the nation. The case is obviously important to the
16 defendant because of the consequences of conviction for
17 a crime. So you are performing an important task for
18 both sides and for the community.

19 I am not saying this to say something obvious,
20 I am saying it to you to emphasize that this case requires
21 your hard work and concentration and sound deliberations,
22 and I am sure from what I have seen of you as a group, you
23 understand this completely and you know what your responsi-
24 bility is.

25 Your fir l role as the jury is to pass on issues

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

arm

397

of fact. You are the finders of the fact, you pass upon the credibility of the witnesses, you determine what weight to give the testimony of the witnesses in regard to questions of honesty and in regard to questions of how good memory is and so forth. You resolve any contradictions in the evidence.

Now, part of this fact-finding process also requires you to determine what inferences, what deductions, you can reasonably and logically draw from one or two or three pieces of evidence with respect to some issue of fact here.

This involves what we call circumstantial evidence, and I will come back to that later. But I want to emphasize that circumstantial evidence is important to the drawing of inferences; it is important -- if it sounds complicated and legalistic it isn't. It is a common sense matter and we do it in our everyday lives all the time, so you can do it in court and I will come back to that subject a little later.

My function is to instruct you now on the rules of law that you are to apply in reaching your verdict. During the trial, as I indicated earlier and you have seen it has been my responsibility to rule on questions of evidence and questions of procedure and I am now instructing

1 arm

398

2 you on the law.

3 So you as a jury and I as a court obviously
4 have our separate functions in this case. The attorneys
5 have the responsibility for asking questions and just now
6 they have given you their summations as to what each side
7 contends has or has not been proven.

8 They have, of course, discussed with you their
9 views of the evidence, their arguments about what it proves
10 and doesn't prove and how strong or weak portions of the
11 evidence are.

12 These arguments are important for you and I
13 am sure you gave them very close attention because that
14 is the way you get a balanced view, a rounded view of the
15 issues of the case.

16 But, of course, the summations are not in and
17 of themselves evidence. It is the testimony from the
18 witness stand, the exhibits, the stipulations, the prior
19 statements of people that are read into evidence, those
20 are the matters which are the evidence in this case and
21 it is your recollection of the evidence which governs and
22 if your recollection differs from that of the attorneys,
23 it is your recollection which controls.

24 I do not intend to summarize the evidence. It
25 has been a short trial and the attorneys have given you

1 arm
2 able summations, so I don't need to. I have no intention
3 of summarizing the evidence but to the extent I make any
4 comment about the evidence, if it differs from your memory,
5 it is your memory which controls because you are the finders
6 of the fact.

7 During the trial I have, of course, made rulings
8 on matters of evidence and other legal and procedural
9 matters. Occasionally I have asked questions of witnesses
10 and I want to say very emphatically that nothing that I
11 have said during the trial and nothing which I say now in
12 this charge, is intended to indicate to you in any way
13 what your verdict should be. You should not in any way
14 speculate or try to infer or deduce what I think your
15 verdict should be.

16 I use the phrase "your verdict" and I mean it
17 because you are the sole finders of the fact and it is
18 your responsibility that hands down the verdict and I have
19 no intention of treading upon or interfering with your
20 responsibility in that regard.

21 You have heard in the testimony references to
22 three men who are alleged to have performed the alleged
23 hijacking and the Government has accused this defendant
24 of being one of those three men and the Grand Jury has
25 returned an indictment against Mr. Montelbano.

This indictment does not name the other two men or either one of them, so I just want to briefly instruct you as follows:

The various questions that may go into whether one defendant is named in a case or whether several defendants are tried together in a case and indicted together, these are questions -- there are many questions that may go into that determination; questions of whether certain defendants can be found; whether it is appropriate and feasible to try people together or for a variety of reasons. None of that is a concern of the jury at all.

These matters are the responsibility of the United States Government through the Department of Justice and the responsibility of the Grand Jury. But you are not to speculate about that, those problems in any regard. The main thing to remember is that this is a case in which you are to determine the guilt or innocence of this defendant.

Your focus is on this defendant as far as your finding of guilt or innocence and you may draw no inferences whatever either for or against him because of the fact that he is the sole defendant on trial before you, and is not being tried with other people. That is not a matter of concern to you.

1
2 I told you at the beginning of the trial and
3 I repeat now, the indictment is merely an accusation, it
4 is merely a charge of a crime. It is no evidence or proof
5 of guilt whatever.

6 No weight whatever can be given to the mere
7 fact that an indictment has been returned. It simply
8 announces the charges and that is all it does.

9 The Government has the responsibility in this
10 court by evidence in this trial, to prove guilt beyond a
11 reasonable doubt. It is the evidence in this trial that
12 matters and that alone.

13 Now, I have said just now that the Government
14 has the burden of proving guilt on each count beyond a
15 reasonable doubt in order for the defendant to be convicted.

16 You will, of course, consider each count separ-
17 ately and you will return a verdict of guilty or not
18 guilty on each count, depending on how you find on each
19 count.

20 The defendant does not have to prove his inno-
21 cence. He has no responsibility or burden of coming
22 forward with a case. The sole burden rests upon the
23 Government to prove the defendant's guilt beyond a reason-
24 able doubt.

25 The defendant is indeed presumed to be innocent

1 until he is proven guilty. He is presumed innocent now,
2 he was presumed innocent at the beginning of the trial;
3 that presumption is still in effect, it will be in effect
4 as you go into the jury room and it will remain in effect
5 until and unless you find that the evidence proves guilt
6 beyond a reasonable doubt.
7

8 What do we mean by a reasonable doubt? I think
9 it is almost self-explanatory but maybe a few words will
10 assist you.

11 The key word is reasonable. A reasonable doubt
12 is a doubt founded in reason. It is a doubt arising out of
13 the evidence or the lack of evidence. It is a doubt which
14 a reasonable person has after carefully weighing all the
15 evidence. It's a doubt which appeals to your judgment
16 and your common sense.

17 But all this is in contrast to some things
18 which it is not. It is not just sympathy or suspicion
19 or whim or caprice or emotion. None of those things are
20 a reasonable doubt.

21 As I said before, the key word is reasonable,
22 and the phrase is used to indicate that this is a reasoning
23 process, reasoning as to what all the evidence means in
24 determining whether there is proof beyond a reasonable
25 doubt or not.

1
2
3 Now, if after a fair and impartial consider-
4 ation of all the evidence you are not satisfied as to the
5 guilt of the defendant on the particular count you are
6 considering, if you have a doubt which would cause you
7 as prudent persons to hesitate before acting in matters
8 of importance to yourselves, then you can say you have a
9 reasonable doubt and, in that circumstance, it is your
10 duty to acquit, to return a verdict of not guilty.

11 On the other hand, if after a consideration
12 of all the evidence you can honestly and candidly say that
13 you have an abiding belief and conviction of the defendant's
14 guilt, such a belief as you would be willing to act upon
15 in important matters in your own lives, then you can say
16 that you have no reasonable doubt and, under those cir-
17 cumstances, it is your duty to convict.

18 One final word is this: Proof beyond a reason-
19 able doubt does not mean proof with absolute certainty or
20 beyond all possible doubt. If this was a rule few persons,
21 however guilty, would ever be convicted. It is practically
22 impossible for any of us to be absolutely, totally com-
23 pletely convinced of any controverted fact unless we are
24 in the realm of mathematics or something like that.

25 So the law in a criminal case is that it is
sufficient if the guilt of a defendant is established beyond

1 arm

404

2 a reasonable doubt but not beyond every conceivable,
3 possible doubt.

4 Now, let me come to the charges in the indict-
5 ment. You will have the indictment in the jury room and
6 you will see that it has three counts.

7 The first count charges the crime of conspiracy.
8 It charges that Mr. Montelbano conspired with others to
9 steal this truckload of frozen fish moving in interstate
10 commerce.

11 The second count charges violation of another
12 federal law. It charges that Mr. Montelbano participated
13 in the obstruction of interstate commerce by committing a
14 robbery of goods moving in interstate commerce.

15 Count three charges that Mr. Montelbano, the
16 defendant, stole from a truck a quantity of seafood then
17 moving in interstate commerce.

18 Now, what I am going to try to do in my charge
19 is explain in as simple terms as I can the elements that
20 must be proven beyond a reasonable doubt in order to con-
21 vict on each of these counts. I want to explain them one
22 at a time, but just by way of introduction let me say a
23 few things.

24 You heard me refer in the last moment or so
25 in connection with each count, I believe, to the term

interstate commerce. The reason that this is referred to is that it is what we call a jurisdictional basis here. The Congress of the United States under our Constitution has power over interstate commerce and the Congress has passed a number of criminal laws making certain acts criminal which interfere with the flow, the progress of interstate commerce, transactions, the movements of goods in interstate commerce.

We are involved in determining, you the jury are involved in determining guilt or innocence of certain counts under certain of these statutes.

The Congress has passed a variety of statutes covering a variety of types of criminal acts in connection with interstate commerce. Some of these statutes overlap so to speak. They refer, although they have somewhat different theories, they refer to essentially the same kind of activity. In a sense these three counts of the indictment overlap. They involve different legal theories, although essentially they boil down to a consideration of the same acts and transactions.

Now, this does not need to be confusing when you study the indictment carefully and if you listen to the instructions. But I just want to point that out to you and I want to tell you that in bringing a criminal

case, that it frequently happens that the United States Government and the Grand Jury will bring an indictment under two or three statutes, even though they seem to overlap.

It is the responsibility of the Court and the jury to consider each of those charges under each of the statutes involved and make its finding of guilt or non-guilt under each of these charges involving these different statutes.

I mentioned to you -- before I get into a detailed description of the counts, I want to just point out perhaps the key words in each so you can have a little bit of framework.

The first count charges a conspiracy. The essence of a conspiracy is an agreement by two or more persons, a scheme by two or more persons, to violate the law. It is a criminal scheme involving two or more persons.

Congress has determined that it is uniquely dangerous when two or more persons act together to violate the law. There may be greater danger to the community sometimes when two or more people act together, the problem of detection might be greater. But for a number of reasons Congress has made conspiracy a separate crime. That is, the agreement, the scheme involving two or more

1 arm

407

2 people, to violate the law.

3 The first count in the indictment charges
4 conspiracy. The second count, the key word there is
5 robbery. The third count, the key word is steal.

6 There are a lot of other words in the indict-
7 ment, but I want to emphasize those as the key things. I
8 will come back to that in a minute, but I would like by
9 way of introduction to point out the difference. I think
10 I mentioned what a conspiracy is. The esense of the con-
11 spiracy is the agreement.

12 Count 2 involves the charge of robbery. Robbery
13 is where someone takes the property of another person by
14 means of violence or a threat of violence.

15 The third count charges the stealing. Steal-
16 ing is perhaps the simplest concept of all. Simply the
17 taking of property that belongs to another person for your
18 own use.

19 I think it would perhaps be best to start with
20 the third count, which is the simplest, and then work
21 backwards.

22 Count 3 of the indictment alleges violation
23 of a statute known as Section 659 of Title 18, United
24 States Code. This provides in pertinent part as follows:

25 "Whoever steals or unlawfully takes from any

motor truck or other vehicle with intent to convert to his own use any goods or chattel of value in excess of \$100 which are a part or which constitute an interstate shipment of freight, or other property," is guilty of a crime.

In other words, in order to convict the defendant of Count 3, the Government must prove the following elements beyond a reasonable doubt:

First, that on or about December 7, 1976, the shipment of seafood -- excuse me, let me go back and read the count. Again, I am not reading this for you to memorize but it will help you to have the exact language by way of introduction.

Count 3. The Grand Jury further charges that on or about December 7, 1976, in the Southern District of New York" -- incidentally that includes Manhattan Island -- "on or about December 7, 1976, in the Southern District of New York Frederick J. Montelbano, the defendant unlawfully, wilfully and knowingly did embezzle, steal, unlawfully take and carry away and conceal from a wagon, motor truck and other vehicle, to wit, O.K. Trucking Company truck, with intent to convert to his own use, goods and chattels valued in excess of \$100, moving as and which were a part of and which constituted an interstated shipment of freight express and other pr erty, to wit, approximately 11,000

pounds of lobster tails, shrimp and crabmeat valued in excess of approximately \$32,000 wholesale."

In order to convict the defendant on Count 3, the Government must prove the following elements beyond a reasonable doubt:

First, that on or about December 7, 1976, the shipment of seafood referred to was stolen from a truck and that the perpetrators intended to convert the seafood to their own use.

Second, that the seafood in the shipment had a value in excess of \$100.

Third, that the seafood constituted an interstate shipment, that is, a shipment passing between two or more states.

Fourth, that the defendant Montelbano wilfully participated in this theft.

I don't believe these elements require much definition but I will say a few things which may help.

To steal simply means to take property which does not belong to the thief but belongs to someone else.

You heard the phrase "convert to a person's own use." To convert to a person's own use means simply to take property for one's own purposes and uses and to deprive the rightful owner of his ability to use the

1 arm

410

2 property.

3 In the present case, if you find beyond a
4 reasonable doubt that the truckload of seafood was diverted
5 from its intended destination and that the seafood was then
6 taken out of the truck, this would constitute a stealing
7 and conversion to the use of the perpetrator.

8 In connection with requirement of value in
9 excess of \$100, you have heard the evidence about the
10 wholesale value. I simply tell you that wholesale is a
11 proper measure of value for the purposes of the statute.

12 With respect to the requirement that the goods
13 constituted an interstate shipment, the Government, of
14 course, relies on testimony and documents showing that the
15 seafood in the truck at the time of the alleged theft,
16 had been loaded in the truck in either New Jersey or New
17 York and was destined for delivery in Pennsylvania, Mary-
18 land and the District of Columbia.

19 The bills of lading and the receipt documents
20 show these destinations. If you accept this proof this
21 would meet the interstate commerce requirement.

22 The fourth and last element I mentioned is the
23 need to find beyond a reasonable doubt that the defendant,
24 Frederick Montelbano, knowingly participated in the theft.
25 This raises, of course, the principal issue in the case.

In this connection, you should consider all the relevant evidence, both the direct evidence and the circumstantial evidence.

Let me briefly define these terms. Direct evidence is when a witness says he has seen something or heard something, direct evidence is where a photograph shows something, a scene or an object; or where a document records or describes a fact or facts.

Circumstantial evidence is where reasonable and logical inferences are drawn from certain pieces of direct evidence to prove or disprove certain things that are of issue in a case. The key words are reasonable and logical inferences. Let me give you a brief example.

Suppose someone is trying to prove that Mr. X played golf at five p.m. on a particular Saturday. Maybe there is no witness to testify directly that the person saw Mr. X playing golf at this time, so maybe there is no direct evidence.

But perhaps his wife testifies that he regularly plays golf on Saturday afternoons. Perhaps the weather report shows it was a sunny day; perhaps another witness who didn't see Mr. X playing golf still saw him get into his car that afternoon with his golf clubs.

You could put all these facts or circumstances

1 arm

412

2 together and reasonably infer that Mr. X did in fact play
3 golf at the time in question.

4 In connection with the question of whether the
5 Government has proved the participation of the defendant
6 in the alleged theft, you should consider all of the direct
7 and circumstantial evidence. Circumstantial evidence is
8 just as strong as direct evidence if the inferences are
9 reasonable and logical.

10 You should, of course, consider the direct
11 evidence on the point consisting of Mr. Eme's testimony.

12 However, you should not stop there but you
13 should consider all the available circumstantial evidence
14 on the question such as the evidence about the red Rambler,
15 evidence about the alleged prior criminal act and so forth.

16 Now the attorneys have discussed the evidence
17 with you thoroughly in their summations and have indicated
18 to you their views as to what is strong and what is weak,
19 what weight or lack of weight should be given to the
20 evidence; what inferences should or should not be drawn.
21 I do not intend to repeat or summarize this evidence in
22 any detail.

23 It is of course up to you to decide what weight
24 or lack of weight should be assigned to each item of evi-
25 dence and, more importantly, what weight or lack of weight

1 arm

413

2 should be assigned to each item of evidence and, more
3 importantly, what weight or lack of weight should be as-
4 signed to the evidence as a whole, taking the different
5 items in conjunction with each other.

6
7 As to the evidence of the alleged prior criminal
8 act, I have already instructed you on that in considerable
9 detail and I won't repeat those instructions. I simply
10 emphasize now that you cannot use it to infer a propensity
11 toward crime. You can consider it only on the question
12 of whether you believe that a similar method was used in
13 that earlier alleged crime, which would bear upon the ques-
14 tion of whether the same person, namely the defendant,
15 committed both the earlier crime and the alleged crime
16 involved in this indictment.

#11
17 Going back for a moment to the last and fourth
18 element that needs to be proved, that is, that the defendant
19 Montelbano knowingly participated in the alleged theft.

20 The word "knowingly" simply means purposely,
21 intentionally as distinct from accidentally or negligently.
22 In other words, if someone is hitchhiking on the road and
23 gets into a truck or was picked up by a truck and the
24 truck happens to contain stolen goods and if the hitchhiker
25 knows nothing about that, the hitchhiker who may have been
riding along with stolen goods but has no knowledge of

1
2 them can't have any guilt with respect to them.

3 But if you have someone, if the Government
4 proves beyond a reasonable doubt that someone intentionally
5 and purposely engages in a theft or seizure of goods, then
6 if that is proved beyond a reasonable doubt, that, of
7 course, would be a knowing commission of the crime.

8 Let's come to Count 2. As I indicated to you,
9 that charges the obstruction or interference with inter-
10 state commerce by means of robbery; the crucial word
11 being robbery. This statute, the statute involved in
12 Count 2, is Section 1951 of Title 18, United States Code,
13 and let's read that.

14 "Whoever in any way or degree obstructs, delays
15 or affects commerce or the movement of any article or
16 commodity in commerce by robbery or attempts or conspires
17 so to do, or commits or threatens physical violence to any
18 person in furtherance of a plan to violate this law,"
19 commits a crime.

20 The statute defines the term robbery as follows:

21 "The term robbery means the unlawful taking or
22 obtaining personal property from the person or in the presence
23 of another against his will by means of means actual or
24 threatened force of violence," etc.

25 Count 2 of the indictment reads as follows:

"The Grand Jury charges on or about December 7, 1976, in the Southern District of New York, Frederick John Montelbano, the defendant, unlawfully, wilfully and knowingly did obstruct, delay and affect commerce and the movement of articles in commerce, to wit, approximately 11,000 pounds lobster tails, shrimp and crabmeat valued in excess of approximately \$32,000 also by robbery.

"That the defendant did attempt and conspire to do so and in furtherance did commit and threatened physical violence to a person, to wit, the driver of an O.K. Trucking Company truck."

That is somewhat complicated and I will try to simplify it to some extent.

In order to convict the defendant of the crime charged in Count 2 the Government must prove beyond a reasonable doubt two elements:

First, that on or about December 7, 1976, the defendant participated in the obstruction or delay of interstate commerce, or the movement of an article in commerce -- in other words, the first element is simply that the defendant participated in the obstruction or the delay of commerce or affecting commerce or movement of an article in commerce.

Secondly that he did so or participated in

1 arm

416

2 doing so by robbery.

3 I really don't think I have to define many
4 of those terms.

5 It is pretty obvious that if you divert a truck-
6 load of goods from its route and take the goods out of the
7 truck, you have delayed, affected, or obstructed interstate
8 commerce.

9 I have already defined commerce, the movement
10 of commodities or goods from one state to one or more other
11 states. The word personal property which is in the statute
12 simply refers to goods. Seafood is personal property in
13 the legal sense.

14 Now, the term robbery. Let me talk about that
15 a little bit. It is simply the taking of property from
16 another person or in the presence of another person against
17 his will by means of actual or threatened force.

18 The threat can be either expressed in words or
19 implied in the presence of several people or other threaten-
20 ing acts. I think very little of a definition needs to be
21 made on that term.

22 Now, we come to Count One which charges con-
23 spiracy. I will read Count One, at least part of it now
24 and another part in a moment.

25 "Count One. The Grand Jury charges on or about

December 7, 1976 in the Southern District of New York and elsewhere" -- I should interrupt myself. I neglected to say that although it is required as an element in both Count 2 and Count 3 and required again in Count 1, that the actions affect interstate commerce, it is not required that the defendant know about the interstate nature of the shipment. So long as the interstate nature of the shipment did in fact exist. Back to the conspiracy count.

"On or about December 7, 1976 in the Southern District of New York and elsewhere Frederick J. Montelbano, the defendant, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree, together with other persons unknown to the Grand Jury to commit an offense against the United States, to wit, violation of Title 18 United States Code, Section 659.

"It was part of said conspiracy that Frederick J. Montelbano would embezzle, steal, unlawfully take, carry away and conceal from a wagon, motor truck or other vehicle with intent to convert to his own use goods and chattel valued in excess of \$100, moving out and which constitute a part of an interstate shipment of freight, express and other property, to wit, 11,000 pounds of lobster tails, shrimp and crabmeat valued in excess of approximately \$32,000 wholesale."

In order to find the defendant guilty of Count One you must find beyond a reasonable doubt two elements:

First, that on or about December 7, 1976 the defendant conspired with other persons to steal goods valued in excess of \$100 from an interstate shipment and convert them to their own use.

Second, at least one of the conspirators committed at least one of the overt acts referred to in the indictment. I will come back to the subject of overt acts in a minute.

What is a conspiracy? A conspiracy is basically a partnership in crime. It is an agreement or scheme among two or more people to commit a crime. The essence is the agreement.

Although we talk about an agreement, we are not talking about an agreement in the usual business sense where people sit down at a table and perhaps write out an agreement and sign it. Criminal conspiracies and agreements seldom take that form. It is very seldom we have a witness admit to the making of an agreement. The usual proof of a criminal is through actions.

You heard the old adage that actions speak louder than words. So it is sufficient in order to find a conspiracy to simply find two or more people entered into

1

arm

419

2

a scheme, participated together in a criminal scheme. Here the alleged scheme is to steal the interstate shipment of seafood.

4

5

6

Again, as in the other elements, in the other counts, the principal question is whether the defendant participated in this alleged scheme.

7

8

9

10

11

12

You must find that the defendant entered into this scheme, did so knowingly, and participated in the acts that have been charged. Again, however, there is no need to show specifically that he knew of the interstate nature of the shipment.

13

14

15

16

17

I mentioned this concept of overt acts and in the crime of conspiracy there is a requirement of proof that, in addition to the mere making of an agreement, there must be one concrete objective act taken in furtherance of the conspiracy by at least one of the conspirators.

18

19

20

21

The idea is that people may make an agreement and change their minds and if they do before they have done anything, then there is no crime committed or the crime of conspiracy is not committed.

22

23

24

25

So you must find beyond a reasonable doubt that at least one of the conspirators committed at least one of the overt acts charged in the indictment. It is not necessary to find all were committed, just one. That is sufficient

for the overt act question.

I will read the overt acts in the indictment.

"Overt Acts. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

"A. On or about December 7, 1976 John Doe, white male in mid-20s or early 30s, five-feet-eight or five-feet-ten, 220 pounds or heavier, curly dark hair, entered the driver's side of the cab of the O.K. Trucking Company truck.

"B. On or about December 7, 1976, Frederick J. Montelbano drove a 1969 red Rambler vehicle, identification No. 9A and so forth, bearing New York license plate number 510CTF on West Street following a truck belonging to the O.K. Trucking Company.

"C. On or about December 7, 1976, the driver of the O.K. Trucking Company truck heard an unidentified male voice say to John Doe words to the effect, 'Tell the driver to do what you tell him or we'll blow his brains out.'

"D. On or about December 7, 1976, in the vicinity of the Fulton Fish Market, Frederick J. Montelbano entered the cab of the O.K. Trucking Company truck on the driver's side."

2 You see, the nature of the overt acts alleged
3 are not complete crimes in themselves but simply objective
4 acts in furtherance, alleged furtherance of the conspiracy.

5 So, again, in order to satisfy this require-
6 ment of proof of an overt act all you need to find is that
7 at least one conspirator committed one of the overt acts
8 charged.

9 Now, let me say a few words about judging
10 credibility of witnesses. This is a common-sense process,
11 although you don't realize it perhaps, you do it in every-
12 day life. You determine believability of people you are
13 talking to and dealing with and you are required to do
14 the same thing in court.

15 I wouldn't presume to tell you all the factors
16 that you use. These are common-sense factors, but let me
17 go over a few of them.

18 First of all, you observe the demeanor, the
19 manner of the witness. Does the witness appear to be
20 candid, straightforward? Does the witness appear to be
21 shifty, untrustworthy? How does he appear to you?

22 Of course, we all know that appearances are
23 important in judging credibility but they are not the
24 end of the story because there are people who are very
25 self-assured and still can be lying. There are people

1

arm

422

2

who can be very nervous and still tell the truth.

3

4

5

6

So manner and demeanor are important but like all the factors of judging credibility of witnesses you don't rely on one factor. You look at the whole range of factors that appeal to your common sense.

7

8

9

10

11

So you go beyond the demeanor or the manner and you can consider the inherent believability of the story, the substance of the story. How does it affect you? How much weight do you think it should be given? Is it probable or improbable under all the circumstances?

12

13

14

15

16

17

18

19

How does the witness's story stand up along with the other evidence? There is no requirement that a piece of testimony be corroborated, but of course it is an important consideration to consider a witness's testimony, is it strengthened or weakened by other testimony? Is it corroborated or contradicted? That is part of looking at all the evidence, not just a single piece of the evidence.

20

21

22

23

24

25

Now, you consider also whether any witness has a motive to falsify. Any bias, any hostility, any interest in the outcome of the case that would make the witness falsify or color his testimony. Has the witness said something in court one moment and another thing in court another moment? In other words, has he given inconsistent statements? Has his testimony in court been different

1 arm

423

2 from what he said on another occasion?

3 You are entitled, of course, to consider all
4 the evidence. There have been occasions where out-of-court
5 statements were read, statements of investigating officers,
6 testimony in the Grand Jury. You are entitled to and re-
7 quired to consider all of that evidence along with the
8 testimony given in court.

9 Now, the testimony of a witness may be entirely
10 truthful and believable to you. It may be in part believ-
11 able and in part not believable. You may according to your
12 judgment disregard a witness's testimony entirely. The
13 point I am making, it is for you to determine the weight
14 to be given to a witness's testimony; whether you credit
15 all or part or none.

16 The defendant in this case did not testify, he
17 did not take the stand. I instruct you that the defendant
18 has an absolute right under our Constitution not to testify
19 in his case. And in exercising this right, he cannot be
20 in any way penalized. In other words, when you are deliber-
21 ating and you are tallying up, so to speak, the evidence
22 pro or con, to see what the Government has proved, I say
23 the Government because the Government of proof, you cannot
24 in assessing the evidence give any consideration whatever
25 to the fact that the defendant did not testify. You cannot

draw any inferences from that fact.

Of course, as I have indicated already, you are entitled to consider any statements that came in made by a defendant, that came into evidence made by the defendant on other occasions, made by the defendant to investigating officers, testimony in the Grand Jury. To the extent that those items are in evidence, they are to be considered by you.

One other point about evidence. There has been testimony and evidence to the effect that the defendant made statements to investigating officers and to the Grand Jury designed to show his innocence of the crime here charged.

The Government contends there is evidence to show, reason to believe, that some or many of those statements were false. Now, it is of course for you to determine whether the defendant on prior occasions did or did not make false statements designed to exculpate himself or show his innocence.

The point I am making to you now is simply this: that I charge you as a matter of law that false statements made to exculpate a person from the inference of crime can be viewed by the jury as circumstantial evidence of a guilty consciousness and circumstantial evidence

1 of the commission of the crime. Of course, as I said, it
2 is up to you to determine whether that should or should
3 not be done. But if you find it was done, you can consider
4 it in the way I have stated it.
5

6 In conclusion, if you fail to find beyond a
7 reasonable doubt that the law has been violated on any or
8 all of the counts charged, then you should not hesitate
9 for any reason to find a verdict of acquittal as to such
10 unproven count or charge.

11 On the other hand, if you find that the law
12 has been violated as charged as to any count, you should
13 not hesitate because of sympathy or any other reason to
14 render a verdict of guilty on that count.

15 I should say to you that under your oath as
16 jurors you cannot allow a consideration of punishment
17 which may be inflicted upon the defendant if convicted
18 to influence your verdict in any way or in any way enter
19 into your deliberations. The duty of imposing sentence
20 rests exclusively on the Court.

21 Your function is solely to weigh the evidence
22 in the case and apply the legal rulings and determine
23 whether on each count there should be a verdict of guilty
24 or not guilty.

25 When you enter into your deliberations of

1 course keep in mind that each of you is entitled to your own
2 sincere good judgment. At the same time, it is expected
3 that you will exchange views with your fellow jurors. This
4 is the essential purpose of jury deliberation, of the demo-
5 cratic jury process, to consider your own views, to discuss
6 them with the others and, at the same time, to listen care-
7 fully and with consideration to the arguments and views of
8 your fellow jurors.
9

10 Any verdict must be the unanimous verdict of
11 each one of you, and I emphasize the words "each one of you."
12 A unanimous word must be the considered judgment of each of
13 the twelve jurors participating in that verdict.

14 If during your deliberations you believe or any
15 one of you believes that you need to have any portion of the
16 testimony read back, or any portion of my charge read to
17 you, or that you seek or need any clarification of any
18 point in the charge, you can send a note to me through
19 your foreman. Your foreman can make out the note stating
20 your request.

21 I simply say that before this is done, please
22 try to trade your recollections. This rereading of testi-
23 mony takes some time and it may interfere with your deliber-
24 ations to some extent, so trade your recollections before
25 you ask for a rereading of anything.

1 arm
2 Sometimes one or two people forget something
3 and others remember it. But again, however, if you need
4 to have testimony or the instructions reread, of course,
5 make your wishes known or if you need any clarification
6 of the instructions.

7 Now, you will have the indictment in the jury
8 room. The exhibits will be sent to the jury room upon
9 request made by your foreman. You are entitled to have
10 some or all of the exhibits depending on your wishes.

11 Juror No. 1 will be the foreman unless she
12 declines to serve, and then you will elect another one of
13 your members as follows.

14 There will be marshals outside the door of
15 the jury room who will convey any requests to the Court
16 that you need to have considered.

17 Any verdict, when you have finished with your
18 deliberation, you should send a note through your foreman
19 saying, "We are ready with a verdict." Please do not put
20 the verdict in the note. The verdict should be announced
21 in open court and the verdict, as I said, must be unanimous
22 on each of the counts involved, must be Guilty or Not Guilty
23 of Count One; Guilty or Not Guilty of Count Two; Guilty or
24 Not Guilty on Count Three, and must be announced in open
25 court.

If you will hold your place for a moment, I will see the lawyers to see if there are any corrections to make in the charge. We will be back with you in just a minute.

(The following took place in the robing room.)

THE COURT: Start with the Government.

MR. SIFFERT: One thing that jumped out at me was the false exculpatory statement. There was a recent case, the name of which escapes me, but a false, exculpatory statement is evidence only of guilty consciousness, not evidence of guilt, and your Honor did that.

THE COURT: What is the good of it, then?

MR. SIFFERT: Guilty consciousness, and I might remember the case.

THE COURT: You don't know what the case is?

MR. SIFFERT: I will find it while looking through my notebook, your Honor.

THE COURT: I don't understand that. I don't know what the point would be.

MR. GORDON: May I briefly state for the record just what the motions were? Because of the time rush I didn't have a chance to say it. I make a motion at the end of the entire case for a judgment of acquittal on the grounds that as a matter of law the Government

1 arm

429

2 failed to prove guilt beyond a reasonable doubt as to each
3 and every count.

4 THE COURT: Motion denied.

5 What are your comments about the charge?

6 MR. SIFFERT: I have found a case, your Honor.
7 It is United States against De Stefano, docket No. 76-1581,
8 slip opinion page 3539, and decided on 5/16/77.

9 It involved a 2113A bank robbery attempt and
10 the charge included a statement that the false exculpatory
11 statement was evidence that he committed the crime. The
12 Second Circuit held that it was evidence only of guilty
13 consciousness and not guilt and therefore it considered it
14 error in the charge.

15 THE COURT: I like to understand things. If you
16 will explain that to me, I would enjoy it.

17 MR. SIFFERT: I see one main distinction and I
18 ask that you simply state a finding by the jury that the
19 statement by the defendant was false, intended to exculpate
20 himself, that is evidence that can be considered as a guilty
21 consciousness. You can determine that shows a guilty
22 consciousness.

23 THE COURT: What are they supposed to make out
24 of that?

25 MR. SIFFERT: From that they would probably

1 arm

430

2 infer that if he had guilt or knew he was guilty but could
3 not infer directly without some intermediate step.

4 THE COURT: That is a case where that is the
5 only evidence?

6 MR. SIFFERT: The only evidence but a case
7 of insufficiency of evidence. I think that could be
8 distinguished unless defense counsel has no objection to
9 the inclusion of the charge.

10 THE COURT: Do you?

11 MR. GORDON: I am in a different situation.

12 MR. SIFFERT: I have the case in court if you
13 want me to try to find it.

14 THE COURT: Why don't you do that?

15 MR. SIFFERT: I did not have that much fore-
16 sight, your Honor. I will try to get it for you.

17 MR. GORDON: My position is that that error
18 to the jury I don't believe can be cured and they were
19 told already.

20 THE COURT: I foresaw that position. It is
21 perfectly sensible. We better find out something rational
22 to say to them.

23 MR. SIFFERT: You didn't say guilt, you said
24 it is probative both of guilty consciousness and of the
25 commission of the crime.

1 arm
2 THE COURT: If he is conscious of guilt at
3 the time he is making statements --

4 MR. SIFFERT: May I make a suggestion? I am
5 sorry --

6 THE COURT: See, if you had a case where you
7 had little or no other evidence and the case was going to
8 the jury on that kind of thing. I can well understand
9 reversing it. In fact you can't make a case by false ex-
10 culpatory statements but here of course you have a vast
11 amount of evidence about the details of the crime, the
12 Rambler, etc. So it fits in, I have always thought -- I
13 can't think of any other use than to be some circumstantial
14 evidence if the defendant knew he was guilty and if the
15 defendant knew he was guilty, he is the guy who knows best.

16 I think you could say it doesn't substitute for
17 other objective facts which are necessary but I think you
18 can say something.

19 MR. SIFFERT: If you feel -- I don't think it
20 is necessary.

21 THE COURT: I want to say something. I think
22 it can be corrected.

23 MR. GORDON: My position, I don't believe it
24 can be corrected and I ask for a mistrial, especially in
25 view of the weakness of the identification testimony.

1 arm
2 THE COURT: What are your other requests? I
3 will make a statement and I hope it is all right. I always
4 like to make sense to a jury and so I will try.

5 MR. GORDON: Your Honor, at one point you said
6 that the defendant is innocent until proven guilty, unless
7 and until proven guilty. I object to the first part of
8 that statement.

9 THE COURT: That is quibbling. I am not going
10 back over it.

11 MR. GORDON: With respect to circumstantial
12 evidence I would request that you tell the jury that when
13 two inferences can be drawn, one favoring guilt and one
14 favoring innocence, you must accept the inference which
15 favors innocence.

16 THE COURT: I always felt that was a misleading
17 charge. The thing is --

18 MR. GORDON: I could be wrong but it seems to
19 me that is a misleading charge. They are not in the busi-
20 ness, not engaged in weighing isolated pieces of evidence,
21 they are engaged in determining from all the evidence
22 whether there is guilt beyond a reasonable doubt. If all
23 the evidence adds up and if the scales are evenly tipped,
24 there isn't guilt beyond a reasonable doubt.

25 THE COURT: Certainly not. But I am not going

1 arm

433

2 to change that charge unless the Government specifically
3 thinks it should be given.

4 MR. SIFFERT: No.

5 MR. GORDON: One point, you said that the
6 threat can be shown by the mere presence of several people.

7 THE COURT: As in most other things.

8 MR. GORDON: Or among other things. I would
9 except to that.

10 You charged to the effect that with respect
11 to knowledge, the defendant did not have to have knowledge
12 of the interstate nature of the shipment. That was sand-
13 wiche'd in those two separate charges. Specifically that
14 is a conspiracy count, and you did say that it must be
15 specific in intent, and I submit that is not inconsistent.

16 And with respect to the conspiracy charge you
17 negate your charge as to specific intent, twice charging
18 that it not be knowledge of the interstate nature of the
19 shipment.

20 MR. SIFFERT: In August, 1976, the Second
21 Circuit decided a case which said that you don't need
22 specific intent.

23 THE COURT: I'm not going to change the charge.

24 MR. GORDON: Unless my recollection -- I could
25 have missed it. I did not hear that charge about the

1 arm

2 membership and you said --

3 THE COURT: Look, I am going to decline to give
4 the usual --

5 MR. GORDON: I did not ask for one.

6 THE COURT: I said that he had to enter into
7 the scheme, do it knowingly and participate, and that is
8 all I am going to give.

9 MR. GORDON: You did say all you need to prove
10 in order to prove conspiracy is that one overt act occurred
11 in the Southern District.

12 THE COURT: On the question of the overt acts.

13 MR. GORDON: Also on the last point, the ques-
14 tion of the credibility of witnesses, I believe your charge
15 was limited to witnesses telling the truth and you did not
16 give any charge with respect to the reliability or accuracy
17 of any testimony. Witnesses can still be wrong.

18 THE COURT: I said that referred to memory.

19 MR. SIFFERT: You told them to use their
20 common sense.

21 MR. GORDON: It is not the same thing.

22 THE COURT: I said they can consider believ-
23 ability and accuracy of memory and I don't think anything
24 more need be said.

25 MR. SIFFERT: I made no reference to it and you

1 arm

435

2 said you would cover it. I was not necessarily pressing
3 for it.

4 THE COURT: I felt that the arguments had the
5 thing in pretty good balance. There was only one thing
6 that might have been said and if you were waiting for me
7 to say it and relying on me, I feel badly, but that is
8 the fact that Mr. Gordon never asked specifically about it
9 at any time.

10 MR. SIFFERT: I am not pressing that, your
11 Honor. We will just accept the charge on that.

12 THE COURT: It was not essentially highlighted.

13 MR. GORDON: I tried not to in view of your
14 Honor's rulings.

15 MR. SIFFERT: The only other thing, your Honor,
16 I was under the impression that you were going to charge
17 fear element, the reasonableness of Eme's fear, and I did
18 spend some time on that because I thought you were going
19 to charge it as an element. If I said anything about --
20 you will have to refresh my recollection a little bit but
21 if I went --

22 Let's drop it.

23 (In open court.)

24 THE COURT: There are no further comments to
25 make by way of the charge.

1 arm

436

2 It is now two minutes to five --

3 MR. SIFFERT: You were going to do that one
4 item?

5 THE COURT: Yes, I am sorry. You recall that
6 I gave a charge on the false exculpatory statements and
7 I want to clarify that a little bit.

8 Let me just review that. The Government con-
9 tends that the defendant in speaking to the investigating
10 officers, testifying before the Grand Jury, made statements
11 designed to show his innocence, non-participation in the
12 crime, and that those statements were false.

13 Again, it is for you to determine whether you
14 think they were false or not. That isn't the point I am
15 making.

16 Let's suppose, however, that you agree with
17 the Government and find that the false exculpatory state-
18 ments were made. You are permitted, if you so find, to
19 consider those as indicating consciousness of guilt on the
20 part of the defendant at the time he made those statements.

21 Now, I think I went further and said that you
22 could not only infer consciousness of guilt but circum-
23 stantial evidence of actual guilt. I didn't mean by that
24 to indicate that kind of evidence about consciousness of
25 guilt could substitute for detailed evidence of whatever

1
2 elements are necessary to be proved, so I just want to
3 leave it this way: That if you find that false exculpatory
4 statements were made, you can infer consciousness of
5 guilt and use that for whatever you think that logically
6 means. But that is all -- that is literally the most that
7 can be made out of that.

8 It is just if you find the false exculpatory
9 statement, you can use it or infer consciousness of guilt
10 and that is the limit of your ability to use that kind of
11 material.

12 Now, it is five o'clock. As far as your
13 deliberations, you will work it out in whatever way and
14 whatever time you wish. It would probably be a good idea
15 to get at least a start on the deliberations tonight.
16 It would probably be my recommendation that you did not
17 attempt to work late. You have had a hard day and a long
18 day and I would work a reasonable period of time and if
19 you are not finished, you go home and have a good night's
20 rest and come back tomorrow.

21 But regardless of my recommendation, you are
22 really on your own. We are here to serve you from now on
23 and you work in whatever way and whatever time you desire.

24 If you intend to work late tonight, you should
25 let us know very shortly, within a half hour, so we will

1 arm

438

2 know what arrangements to make for dinner.

3 In other words, I would work for an hour or
4 so, I would just start working and see what you want to do
5 and let me know through a note.

6 I do need to dismiss the alternates at this
7 time.

8 (Alternates excused.)

9 THE COURT: Swear the marshals.

10 (The marshals were sworn by the clerk.)

11 THE COURT: I have one other thing to say.

12 Page one of the indictment, in order to simplify this, we
13 are cutting out the reference to subparagraph (b) at the
14 bottom and when we send the indictment in we will just X
15 that out, just eliminate that from your consideration.
16 The lawyers will arrange that.

17 (Jury retired to deliberate at 5:05 p.m.)

18 (Jury returned to the courtroom at 5:40 p.m.)

19 THE CLERK: Ladies and gentlemen, the Judge
20 requested that I give you these instructions. We have
21 received your note requesting that you leave at 5:30 and
22 you will resume at ten o'clock tomorrow morning.

23 You are not to talk about the case to anyone
24 and not discuss it amongst yourselves when you leave.

25 You will report here at ten o'clock tomorrow

1 arm

439

2 and when all twelve of you are here, then you will start
3 your deliberations. The marshals will be waiting for you
4 tomorrow morning.

5 You are excused now and you will return at ten
6 o'clock tomorrow.

7 (Court Exhibit A marked.)

8 (Adjournment taken until August 4, 1977 at
9 10:00 a.m.)

10 - - -
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Judge Griesa

UNITED STATES OF AMERICA

vs.

77 Cr. 192

MONTALBANO

New York, New York
August 4, 1977 - 10 a.m.

- - -

THE COURT: We have received a note at 10:22 as follows:

"We would like to see the forty mug shots in evidence, the pictures of the lineup and the picture with the defendant with facial hair, the picture without facial hair, showing his broken tooth."

MR. SIFFERT: Corresponding to that is Government Exhibit 20, which is the 40 mug shots; 7A and B which is the lineup photographs and 19 with facial hair and Defendant Exhibit B with the tooth.

THE COURT: You can send those in.

This case which Mr. Siffert brought up yesterday I have now read and this is the case about the charge of false exculpatory statements. It is a decision by Judge Palmieri joined by Judges Mansfield and Smith and this is a decision where the Court held that one of the defendants should have her conviction reversed because of the insufficiency of evidence, and held that it was error for the trial Court to give an instruction as follows:

1 jqlt 2

2 "Evidence has been introduced that the defendant
3 in this case, Linda D. Stefano, made certain exculpatory
4 statements or claimed statements outside of this courtroom
5 explaining her actions. If the jury finds such statements
6 were true and the defendant made them with knowledge of their
7 falsity, the jury may consider them as circumstantial
8 evidence of the defendant's guilt."

9 Then the Court goes on to say:

10 "It is clear that this charge was incorrect,
11 false exculpatory statements are not admissible as evidence
12 of guilt, but rather as evidence of consciousness of guilt."

13 The Court cites U.S. v. Johnson, 503 F. 2nd 430,
14 page 433.

15 There is some confusion about the citation.
16 But anyway, it is the same case that is quoted later in
17 this opinion to the effect that falsehoods told by a defendant
18 in the hope of extricating himself from suspicious circum-
19 stances are insufficient proof on which to convict where
20 other evidence of guilt is weak and the evidence before the
21 Court is as hospitable to an interpretation consistent with
22 the defendant's innocence as it is to the government's
23 theory of guilt.

24 This is not a very clear opinion and what is it
25 that the jury is supposed to do with evidence of consciousness.

1 jqlt 3

2 of guilt, I haven't the faintest idea, because it can't stop
3 there.

4 The state of mind of the defendant at the time he
5 makes some statement to an investigating officer or to the
6 grand jury is not in and of itself an end in itself. He
7 is not being charged with something that depends on the state
8 of mind at the time he makes the statements. He is not being
9 charged with false statements or perjury at least in the
10 cases we are talking about.

11 So evidence of consciousness of guilt is not an
12 end in itself.

13 Inevitably, it has to be something that the jury
14 can use to determine guilt or innocence with respect to what
15 the defendant is charged with and I think that what the mean-
16 ing of that is that where you have got little or no evidence
17 of any other kind, the Court of Appeals is not going to
18 permit the jury to convict of a crime and find the elements
19 of the crime based on this false exculpatory statement.

20 MR. SIFFERT: I think your Honor's corrected charge
21 accurately set forth that there cannot be a substitute for
22 findings that you have to make.

23 THE COURT: I was even tempted to go out and do
24 something more this morning, but I think it would probably
25 highlight it. I hadn't read the case.

1 jqlt 4

2 MR. SIFFERT: In the original charge on it
3 you did not say that it is false exculpatory is circumstan-
4 tial evidence of guilt per se. What you said was that it
5 can be used by you as circumstantial evidence of guilty
6 consciousness and has independent value concerning the
7 commission of the crime and --

8 THE COURT: And from that --

9 MR. SIFFERT: You didn't say from that. So you
10 didn't quite say what is prescribed by the DeStefano case.

11 MR. GORDON: I think probative value on the issue
12 of guilt or independent of probative value as to whether or not
13 the defendant committed a crime is just another way of say-
14 ing guilt.

15 THE COURT: Reason, logically, Mr. Gordon. Help
16 me out. It is not a matter of trying to take advantage of
17 every little ploy to help your client. You are an officer
18 of the Court and you have got a responsibility of being that
19 way.

20 Our job now is to make -- to do the best we can
21 to have the jury in their deliberating on the basis of
22 understandable instructions and if I gave an instruction at
23 the end or anywhere that was not understable to the jury,
24 we don't know what the jury is doing, but it is always
25 possible that they will get hung up on things that are

1 jqlt 5

2 confusingly stated.

3 It has happened before.

4 MR. GORDON: I don't know what you can do to
5 improve upon what you did the second time you charged.

6 THE COURT: I think this:

7 In the first place, I hadn't looked at the case and
8 I don't think it was completely thought out. The record
9 will show what I said but I ended up saying that the jury
10 could use this to infer consciousness of guilt and that is
11 sort of the end of the line, so to speak.

12 I did not go on and say how this could apply to
13 any issue in the case. Maybe that is about where it should
14 be left.

15 MR. SIFFERT: I think unless the jury expresses
16 confusion in a note that it probably would be best to just
17 leave it. I think the government made the argument that it
18 wanted to -- concerning what to do, consciousness of guilt
19 and defining it that that is another circumstance that they
20 can determine in the issues.

21 Why would he lie? Mr. Gordon argued that he would
22 lie to cover up for somebody else and the government said
23 he would like to cover up consciousness and your Honor charge
24 that false exculpatory statements could be used as
25 consciousness of guilt.

1 jqlt 6

2 THE COURT: From a common sense point of view,
3 the consciousness of guilt is sufficient and that is the
4 message I gave them at the end, but I told them it could not
5 be a substitute for the detailed elements.

6 MR. SIFFERT: And you said that unlike DeStefano,
7 there is not a paucity of evidence. It is not that situa-
8 tion.

9 MR. GORDON: I don't remember if you made that
10 finding.

11 THE COURT: I didn't make that finding to the jury

12 MR. SIFFERT: No, in terms of you were trying to
13 surmise what that case might have involved.

14 THE COURT: Let's let it go. I think you are
15 right.

16 MR. GORDON: I am not requesting that you clarify
17 it any further at this point. If the jury comes in with a
18 note that would be the appropriate time to try to figure out
19 how we deal with it now.

20 THE COURT: It is an interesting point. I think
21 the warning is that you don't emphasize this kind of thing
22 when the evidence is otherwise very weak. You are not going
23 to let somebody be convicted on evidence of consciousness
24 of guilt.

25

1 jqlt 7

2 (At 2:30 p.m. the jury entered the
3 courtroom.)

4 THE CLERK: Have you agreed upon a verdict?

5 THE FOREMAN: Yes.

6 THE CLERK: What is your verdict?

7 THE FOREMAN: We find the defendant guilty.

8 THE CLERK: On all three coun .?

9 THE FOREMAN: Yes.

10 THE COURT: Do you wish to have jury polled?

11 MR. GORDON: Yes, your Honor.

12 (Jury polled.)

13 THE COURT: Ladies and gentlemen, thank you very
14 much for your hard work and attention to the case. I would
15 just like to add that whatever determination you might have
16 made would be your determination and would have of course
17 stood, but it is clear to me that there was ample evidence
18 to justify the verdict and I think you did an admirable job
19 because that was not the most simple case.

20 It is apparent to me that you put the evidence
21 together and did not get misled by focusing on one or two
22 things out of context. You certainly reached a verdict
23 which to say the least is justified by the evidence.

24 Thank you very much. You may now retire. You are
25 excused.

July 26, 1977

John S. Siffert, Esq.
Asst. United States Attorney
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007

Re: United States -v- Frederick Montelbano
77 Cr. 192TPC

Dear Mr. Siffert:

Please be advised that pursuant to 804(b)(5) of the Federal Rules of Evidence the defendant, Frederick Montelbano, intends to offer statements of the confidential informant made to Sergeant Frank A. Trefcer and Detective Downs on December 9, 1976. These statements concern the informant's own observations and those of an unnamed truck driver which were reported to the informant. The substance of the statements is contained in the enclosed police report.

Defendant Montelbano intends to introduce statements of the confidential informant made to S.A. Michael Armes on December 8, 1976, to the effect that the white, male perpetrator wearing the purplish-grey knit cap was 5'10" tall, had a medium build, and was seen walking with a bent back.

In addition, defendant Montelbano intends to offer the statements of the confidential informant on May 20, 1977, to S.A. Kosednor. The substance of the statements is as follows:

1. When shown 47 individual mug shots, including defendant's, the confidential informant selected photos of four individuals as people known to him, correctly identified a photo as looking like a particular person, selected five photographs as people he may have seen, but did not know by name, but did not select defendant's photograph.

2. When shown photos of the lineup and asked if he recognized anyone, he stated that he did not.

John S. Siffert, Esq.
Asst. United States Attorney

July 26, 1977
Page Two

Re: United States -v- Frederick Montelbano
77 Cr. 192TPG

3. He stated that he did not know the name "Frederick Montelbano".

4. That he could not identify any of the individuals in the photographs shown as any of the individuals he had seen in the red Rambler or standing on the corner of 10th Avenue and West 17th Street on the morning of December 7, 1976.

Sincerely,

David Gordon
Associate Attorney
Tel.: (212) 577-3411

DG/mmp

Enclosure (1): Police Report

cc w/enc.: Honorable Thomas P. Griesa
United States District Judge

CASE REPORT		PDCN Form 32B (Rev. 8/71)		Classification		Code		1. Detective Division Number 6-3511-76	
Sussex County Police Department		3. Felony Misdemeanor Local Investigation		4. Other Number		5. Precinct (or) Village SIXTH 6-5399-7			
Date and Time Reported 2-7-76 1704		6. Place of Occurrence (Number - Street - Village - Post Number) SERVICE RD 500 WEST GUN CREEK 622		7. Incorporated Village (Yes) No		8. Inside (Yes) No		9. Date - Time of Occurrence 12-7-76	
10. Premise - Business, Etc. RAMPWAY		11. Trade - Business Name 10TH AVE 16TH ST, MAN.		12. Complainant (or) Victim's Surname, First Name, Initial EMER RALPH		13. Age 18		14. Occupation TRUCK DRIVER	
15. Complainant (or) Victim's Address (Number - Street - Village) 244 CLEMENTON RD, BERLIN, N.J.		16. Home Telephone 609-767-4974		17. Business 316-0322		18. Reported by (Surname - First Name - Initial) COMPLAINANT		19. Address (Number - Street - Village)	
20. Telephone Number		21. Weapon Used, Describe NONE SHOWN - GUN THROTTLED		22. Uniform Member Assigned PO E FARRELL SH 1496		23. Detective Assigned DET. MADON			
24. Date - Time - Transmitted		25. Number of Arrests Adult Juvenile		26. Arrests (Number - Command - Name - Age)		27. Mode of Entry Pry (door-window) Broken glass (door-window) Unlocked (door-window) Cut screen (door-window) Other (Key-pick-unknown)		28. Point of Entry Front Side Rear Roof Cellar	
29. BURGLARY INFORMATION		30. Property Stolen		31. Safe		32. Malicious damage: Yes/No Human being present in premise: Yes/No		33. Weather Conditions Rain Snow Clear Fog Cloudy Unknown	
34. ARTICLE HIJACK 18' TRUCK		35. DESCRIPTION OF PROPERTY 1973 FORD STRAIGHT TRUCK MODEL 800 SERIES COLOR WHITE PENS REG CL14652 OK TRUCKING (LIST ADDITIONAL PROPERTY ON REVERSE SIDE) ON TRUCK		36. VALUE		37. Reporting Members Investigation (or) Remarks (if any) 250-300 BOXES 50 LBS EACH OF LOBSTER TAILS & SHRIMP 25 LBS CRAB MEAT (9 BOXES)			

SUPPORTING DEPOSITION

CASE REPORT NO. 6-5399

I am RALPH EMER, and reside at 244 CLEMENTON RD, BERLIN, N.J.
and I am employed by OK TRUCKING CO. 3425 S. ORANGE ST, PHILADELPHIA, PENNS.
That on the 7 day of DEC 1976 at about 3:10 AM I

WAS DROPPED FROM MY HIJACKED SEAFOOD TRUCK ON SERVICE RD
OF LIE AFTER BEING HIJACKED ON 10TH AVE AT 16TH ST, MANHATTAN
AT ABOUT 10³⁰ HRS. 12-7-76. BY 3 MALE WHITES.

- ① 25 YRS. 5'8" 250 LBS BLACK HAIR BLUE PEA COAT DARK PANTS.
- ② 25 YRS. 6' 150 LBS BLACK HAIR BLUE PEA COAT DARK PANTS
- ③ DARK HAIR BLACK LEATHER COAT - UNKNOWN DISCRIPTION

Your deponent is DRIVER
(relationship to property, if pertinent)

Your deponent asserts that he did not give any person permission to perform the above described act.

ANY FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.15 OF THE PENAL LAW.

Signature of deponent

X Ralph Emer

WITNESS 12-7-76

Witness

PO
Rank

FARRELL E
Surname

1496
Shield

6
Command

CERTIFICATE OF SERVICE

January 6, 1978

I certify that a copy of this [REDACTED] appendix has been mailed to the United States Attorney for the Southern District of New York.

Nathan J. Gelberman